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# A Rejoinder to Professor Schauer's Commentary

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## A REJOINDER TO PROFESSOR SCHAUER'S COMMENTARY

Yale Kamisar\*

It is quite a treat to have Professor Frederick Schauer comment on my *Miranda* article.<sup>1</sup> Professor Schauer is a renowned authority on freedom of speech and the author of many thoughtful, probing articles in other areas as well, especially jurisprudence. I am pleased that in large measure, Schauer, too, laments the erosion of *Miranda* in the last four-and-a-half decades<sup>2</sup> and that he, too, was unhappy with the pre-*Miranda* due process/"totality of circumstances"/"voluntariness" test.<sup>3</sup> I also like what Schauer had to say about "prophylactic rules," a term that has sometimes been used to disparage the *Miranda* rules.<sup>4</sup> As Schauer observes, the use of such rules is "ubiquitous in constitutional law"<sup>5</sup> and "there is no special category of prophylactic rules . . . . The phrase 'prophylactic rule' is accordingly best seen as a simple redundancy, sort of like 'null and void.'"<sup>6</sup>

However, when Schauer maintains that (1) the right to remain silent "existed independent[ly] of *Miranda*,"<sup>7</sup> and that (2) "the right to counsel during interrogation" also "preceded *Miranda*,"<sup>8</sup> I have to part company with him on both counts. (I readily admit that whether there was a right to counsel during interrogation prior to *Miranda* is a much closer question than whether there was a right to remain silent.) Much turns on what one means by "rights."

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1. Frederick Schauer, *The Miranda Warning*, 88 WASH. L. REV. 155 (2013); see also Yale Kamisar, *The Rise, Decline, and Fall (?) of Miranda*, 87 WASH. L. REV. 965 (2012). See generally *Miranda v. Arizona*, 384 U.S. 436 (1966).

2. See Schauer, *supra* note 1, at 156.

3. See *id.* at 157–59.

4. See Kamisar, *supra* note 1, at 985–90, 992–95.

5. Schauer, *supra* note 1, at 160 n.30.

6. *Id.*

7. *Id.* at 156.

8. *Id.*

## I. THE RIGHT TO REMAIN SILENT

Let us look first at *the right to remain silent*.

Schauer believes that Justice Frankfurter's 1949 plurality opinion in *Turner v. Pennsylvania*<sup>9</sup> supports his view that the right to remain silent preceded *Miranda* by many years.<sup>10</sup> At one point Frankfurter does say that Turner "was not informed of his *right to remain silent* until after he had been under the pressure of a long process of interrogation and had actually yielded to it."<sup>11</sup> Schauer might have cited the 1963 case of *Haynes v. Washington*<sup>12</sup> as well. In that case, too, writing for a 5-4 majority, Justice Goldberg noted that the defendant had never been "advised . . . of his right to remain silent."<sup>13</sup>

But *what does it mean* to say that even before *Miranda* one had a right to remain silent? In both the aforementioned *Turner* case and in *Watts v. Indiana*,<sup>14</sup> a companion case to *Turner*, state law *required* that arrested persons be given a prompt preliminary hearing.<sup>15</sup> However, neither in Indiana nor Pennsylvania (nor in the great majority of states) was this requirement taken seriously. *Unless other circumstances* added up to a deprivation of due process, the mere fact that an arrestee failed to obtain a prompt preliminary hearing did not keep out any resulting confession or incriminating statement.<sup>16</sup> Did arrestees in these states have *a right* to a prompt preliminary hearing? I would answer in the negative. The police did not believe arrestees had such a right and they acted accordingly. Arrestees soon found out that, as a practical matter, the police's understanding of the situation was the correct one.

At no time prior to *Miranda* did suspects have a "right" to remain silent, at least as I define "right" and as I believe that term should be defined. It is plain that most suspects did not know they had such a right (or, to put it another way, did not realize that the police lacked any lawful authority to compel an answer). Moreover, the great majority of police officers did nothing to correct this misimpression.<sup>17</sup> Nor is that all. The typical police interrogator proceeded as if he or she did have a right

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9. 338 U.S. 62 (1949).

10. Schauer, *supra* note 1, at 155 n.5.

11. *Turner*, 338 U.S. at 64 (plurality opinion) (emphasis added).

12. 373 U.S. 503 (1963).

13. *Id.* at 510-11.

14. 338 U.S. 49 (1949).

15. *Turner*, 338 U.S. at 64; *Watts*, 338 U.S. at 53.

16. See Kamisar, *supra* note 1, at 1030-31.

17. *Id.* at 1000.

to an answer and would often persist in questioning suspects until some answers were obtained.

Against this background, I would maintain that in the years before the police were *required to inform suspects* that they had a right to remain silent—and the police did not have to do so until *Miranda* instructed them that, in the absence of other protective measures, they must do so—such a right did not exist. To put it somewhat differently, I would say that *requiring the police* to warn custodial suspects that they had a right to remain silent—which *Miranda* did for the first time—*established* such a right.<sup>18</sup>

As Professor Tracey Maclin has recently reminded us,<sup>19</sup> Justice Holmes once said that “[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.”<sup>20</sup> Until *Miranda* was decided, however, *the failure to inform* a custodial suspect that he or she had a right to remain silent *carried no consequences*.

Despite the failure of the police to inform suspects that they had a right to remain silent, any resulting confession or incriminating statement was still admissible *unless the police did something much worse*—such as subjected the suspect to protracted relay interrogation<sup>21</sup> or, when the suspect refused to “cooperate,” pretended to “bring in” his ailing wife for questioning.<sup>22</sup>

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18. As Professor Gerald M. Caplan has observed: “That many suspects [in the pre-*Miranda* era] might erroneously believe that they were obligated to answer police questions or that the police acted as if such were the case did not trouble the Supreme Court. All understood that the government’s obligation was not to counsel the accused but to question him.” Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1423 (1985).

19. TRACEY MACLIN, *THE SUPREME COURT AND THE FOURTH AMENDMENT’S EXCLUSIONARY RULE* 348 (2013).

20. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). As the principal Reporters for the American Law Institute’s *Model Code of Pre-Arrest Procedure* pointed out almost a half-century later, although different traditions and history may have led other countries to different approaches, “in America it is almost inevitable that the draftsman will place heavy reliance on the exclusionary rule as a sanction for violations.” Paul M. Bator & James Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 77 (1966) (pre-*Miranda*).

Unfortunately, the prosecution *can use evidence derived from* a failure to give the *Miranda* warnings although it cannot use the statements themselves. See, e.g., *Kamisar*, *supra* note 1, at 998–1002 (discussing *Oregon v. Elstad*, 470 U.S. 298 (1985)).

21. See *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).

22. See *Rogers v. Richmond*, 365 U.S. 534 (1961).

## II. THE RIGHT TO COUNSEL

Let us look next at the “*right to counsel during interrogation*, whose recognition and enforcement,” according to Schauer, “again preceded *Miranda*.”<sup>23</sup>

As long ago as 1949, in the aforementioned *Watts* case, Justice Frankfurter noted that during the entire period of interrogation, the defendant was “without advice as to his constitutional *rights*.”<sup>24</sup> In context, this could only have meant both the right to counsel *and* the right to remain silent. But surely Frankfurter did not mean—more than a decade and a half before *Miranda*—that a suspect had a right to counsel in the sense that a failure to know, or to be advised of, such a right *without more* barred the use of any resulting confession.

Justice Jackson, too, used “right to counsel” language in 1949. He noted in *Watts* and two companion cases that one factor stood out: “[t]he suspect neither had nor was advised of his *right to get counsel*.”<sup>25</sup>

But what did Justice Jackson mean by his reference to the “right to get counsel”? When it came to police interrogation and confessions, Justice Jackson was the Rehnquist of his era. He would have admitted the confession in a companion case to *Watts* although the defendant had *neither* been advised of his so-called right to remain silent *nor* his so-called right to counsel and even though the defendant had been interrogated over a five-day period for a total of twenty-three hours.<sup>26</sup>

Five years earlier, in the notorious case of *Ashcraft v. Tennessee*,<sup>27</sup> where the defendant had been subjected to thirty-six hours of “relay interrogation” by various officers,<sup>28</sup> Justice Jackson (who was convinced the defendant had actually committed the crime) urged the Court to admit the resulting confession into evidence. At no point during Jackson’s long, forceful dissent did he indicate that the defendant had either been warned of his right to remain silent or his right to counsel.<sup>29</sup>

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23. Schauer, *supra* note 1, at 156 (emphasis added).

24. *Watts v. Indiana*, 338 U.S. 49, 53 (1949) (emphasis added).

25. *Id.* at 59 (Jackson, J., concurring in *Watts* and dissenting in *Turner v. Pennsylvania*, 338 U.S. 62 (1949)) (emphasis added).

26. *See id.* at 61; *see also Turner*, 338 U.S. at 63–64.

27. 322 U.S. 143 (1944).

28. According to the opinion of the Court, written by Justice Black, “[f]or thirty-six hours after Ashcraft’s seizure during which period he was held incommunicado, without sleep or rest, relays of officers, experienced investigators, and highly trained lawyers questioned him without respite.” *Id.* at 153. “Testimony of the officers shows that the reason they questioned Ashcraft ‘in relays’ was that they became so tired they were compelled to rest.” *Id.* at 149.

29. *Id.* at 156–74 (Jackson, J., dissenting).

It did not seem to matter.

Whatever the Justices who talked about “the right to counsel” or “the right to get counsel” meant in the 1940s, it soon became clear that the failure to honor this right, without more, did not affect the admissibility of any resulting inculpatory statement. A decade after *Watts* and its companion cases had been decided, the “right to counsel” issue was graphically presented in *Crooker v. California*.<sup>30</sup> Without being advised of his right to counsel, a custodial suspect on his own initiative asked to talk to a lawyer (naming a specific attorney), but was not permitted to see one. The confession he made soon afterwards was allowed into evidence.<sup>31</sup>

To rule otherwise, the *Crooker* Court told us, “would effectively preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney.”<sup>32</sup> (Mr. Crooker maintained that it was *unfair* to continue to question a custodial suspect, especially one facing the death penalty, who was trying to contact a lawyer. Did a majority of the Court address *this* issue?)

True, the Court underscored the fact that Mr. Crooker had an impressive educational background. He was a college graduate who had attended a year of law school (including criminal law).<sup>33</sup> But a companion case made it clear that Mr. Crooker’s educational background was not the decisive factor in his case.

The same day it decided *Crooker*, the Court handed down *Cicenia v. La Gay*,<sup>34</sup> another case involving a defendant who had specifically asked to see his lawyer, but was not allowed to do so. The Court told us that the defendant’s right to counsel argument “is disposed of by *Crooker v. California*, decided today.”<sup>35</sup> But surprisingly the Court had nothing to say about Mr. Cicenia’s education. As it turned out, however, petitioner and respondent agreed that Cicenia only had a grade school education and two years of vocational school training.<sup>36</sup>

When Schauer tells us that “the right to counsel during interrogation . . . preceded *Miranda*”<sup>37</sup> he relies primarily on *Escobedo v.*

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30. 357 U.S. 433 (1958) (Justice Clark writing for the Court).

31. *See id.* at 436–40.

32. *Id.* at 441 (emphasis added).

33. *See id.* at 435, 438, 440.

34. 357 U.S. 504 (1958).

35. *Id.* at 508.

36. *See* Brief of Petitioner at 3, *Cicenia*, 357 U.S. 504 (No. 177), 1958 WL 92004 at \*3; Brief of Respondent at 5, *Cicenia*, 357 U.S. 504 (No. 177), 1958 WL 91858 at \*5.

37. Schauer, *supra* note 1, at 156.

*Illinois*.<sup>38</sup> This is a plausible reading of *Escobedo* (especially when one takes into account the way the *Miranda* Court looked back at *Escobedo*), but it is by no means the only way to read that case. The trouble with Justice Goldberg's opinion for the Court in *Escobedo* is that it has an accordion-like quality.<sup>39</sup>

At some places the opinion rejects the argument that the police need an "effective interrogation opportunity" so forcefully and so peremptorily that it promises (or threatens, depending upon one's viewpoint) to extinguish all police interrogations as we know them. When I read the following, for example, I hear the crashing of cymbals:

It is argued that if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly. . . . This argument, of course, cuts two ways. The fact that many confessions are obtained during this period points up its critical nature as a "stage when legal aid and advice" are surely needed. . . . The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. . . .<sup>40</sup>

We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation . . . .<sup>41</sup>

We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and

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38. 378 U.S. 478 (1964).

39. The accordion-like quality of *Escobedo* may not be solely the fault of its author. The four members of the Court who joined Justice Goldberg's opinion—Chief Justice Warren and Justices Black, Douglas, and Brennan—all had strong views about police interrogation and confessions. It would not be surprising if one or more of these Justices urged (or even insisted upon) the addition, or deletion, of certain language.

Justice Holmes is supposed to have complained that when he circulated his opinions one or more of his colleagues would pick out "a plum here, and the other . . . a plum there, and they send it back to me with nothing but a shapeless mass of dough to father!" See HARLAN B. PHILLIPS, FELIX FRANKFURTER REMINISCES 299 (1960). It may be that Justice Goldberg's colleagues picked out too many plums or added too many.

40. *Escobedo*, 378 U.S. at 488.

41. *Id.* at 488–89.

exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.<sup>42</sup>

Toward the end of its opinion, however, the *Escobedo* majority is a good deal more restrained. (This is the part of the opinion that many in law enforcement work probably underlined or highlighted.) When I read *this* portion of the *Escobedo* opinion, I hear only the playing of the piccolo:

We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.<sup>43</sup>

Do *all* these conditions have to be satisfied before *Escobedo* applies? At what point does a "general inquiry" begin to "focus" on a particular suspect? Is there any interrogation process that *does not* lend itself to eliciting incriminating statements? Is *Escobedo* limited, as the immediately preceding paragraph suggests, to situations, such as the one that occurred in *Escobedo* itself, "where the suspect has requested and been denied an opportunity to consult with his lawyer"? (If so, *Escobedo* is greatly limited for that reason alone, because even when advised of a right to counsel, most suspects decline to see a lawyer.)<sup>44</sup>

There is reason to think that not allowing the suspect to consult with his lawyer when he repeatedly asks to do so is a highly significant feature of *Escobedo*. The Court mentions it four times.<sup>45</sup> And the very first sentence of the *Escobedo* opinion begins:

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42. *Id.* at 490.

43. *Id.* at 490–91 (internal citation omitted). Although the block quotation begins: "We hold therefore . . .", "We hold *only, however*" would seem a more appropriate way of expressing it.

44. See Kamisar, *supra* note 1, at 980.

45. See *Escobedo*, 378 U.S. at 479, 481 (twice), 485. Moreover, in the penultimate paragraph of the opinion, the Court tells us that "when the process shifts from investigatory to accusatory—when its focus is . . . to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." *Id.* at 492.



The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution . . . and thereby renders inadmissible . . . any incriminating statement elicited by the police.<sup>46</sup>

Commenting on *Escobedo* a year after it was decided and a year before *Miranda* was handed down, Judge Henry Friendly thought it could be read fairly narrowly.<sup>47</sup> So did the two principal Reporters for the American Law Institute's *Model Code of Pre-Arrest Procedure*. Writing about police interrogation and the right to counsel two years after *Escobedo* was decided and a short time before *Miranda* was handed down, they maintained that "a legislature would be justifiably reluctant to provide that in the few hours immediately following arrest questioning be delayed pending the arrival or appointment of counsel."<sup>48</sup> In many cases, they went on to say, "this would completely prevent any questioning at all at the very time such questioning is most necessary . . . ."<sup>49</sup>

### III. A FEW WORDS ABOUT TERMINOLOGY

It may be my shortcoming, but I find it unhelpful, indeed confusing, when discussing *Miranda*, to talk about "voluntary," "involuntary," and "self-incrimination," terms Schauer uses several times.<sup>50</sup> The same may be said for "genuinely voluntary self-incrimination," another term Schauer uses.<sup>51</sup> I believe that "voluntariness" and "involuntariness" are so unfocused and unruly that the less often they are used the better. Moreover, I do not believe they are appropriate terms when talking about *Miranda*.

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46. *Id.* at 479.

47. See Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 950 (1965) (*Escobedo* "can well be read as requiring the assistance of counsel only when the police elicit a confession at the station house from a suspect already long detained, whose case is ripe for presentation to a magistrate—in other words, that the police, by unduly deterring such presentation, may not postpone the assistance of counsel that would then become available.").

48. See Bator & Vorenberg, *supra* note 20, at 75 (first emphasis added). Professors Bator and Vorenberg recognized, however, that if "custody continues for more than a very few hours, the claims for conditioning questioning on the presence of counsel seem to us considerably stronger." *Id.*

49. *Id.*

50. See Schauer, *supra* note 1, at 158–59.

51. See *id.* at 159.

As Professors Bator and Vorenberg once pointed out:

Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are “voluntary” in the sense of representing a choice of alternatives. On the other hand, if “voluntariness” incorporates notions of “but-for” cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.<sup>52</sup>

Although many thought the *Miranda* Court would focus primarily on the Sixth Amendment right to counsel, it turned out that the Court relied largely on the Fifth Amendment's privilege against self-incrimination instead.<sup>53</sup> Although, as I shall point out shortly, the “voluntariness” test continues to apply in a number of important situations, when *Miranda* does apply we should use the language of the Fifth Amendment's privilege against self-incrimination rather than talk about “voluntariness,” “involuntariness,” or “overbearing the will.”

Although many people seem to find it quite difficult to talk about *Miranda* without discussing the warnings, I share Professor Schulhofer's view that the warnings are only one of a series of holdings or steps, and that they are not the most important feature of *Miranda*:

First, the Court held that informal pressure to speak—that is, pressure not backed by legal process or any formal sanction—can constitute “compulsion” within the meaning of the fifth amendment. Second, it held that this element of informal compulsion is present in *any* questioning of a suspect in custody, no matter how short the period of any questioning may be. Third, the Court held that [in the absence of any other protective devices] precisely specified warnings are required to dispel the compelling pressure of custodial interrogation. The third step, the series of particularized warnings, raises the concerns about judicial legislation that usually preoccupy *Miranda*'s critics. But the core of *Miranda* is located in the first two steps.<sup>54</sup>

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52. Bator & Vorenberg, *supra* note 20, at 72–73.

53. Even the lawyer who argued the case on behalf of Mr. *Miranda* was surprised by the Court's heavy reliance on the privilege against self-incrimination. He confessed (if one may use that term) that he had written the briefs “with entire focus” on the Sixth Amendment right to counsel. *See* John J. Flynn, Panel Discussion of the Exclusionary Rule, 61 F.R.D. 259, 278 (1972). Flynn's remarks came at a discussion before the 1972 Judicial Conference of the Ninth Circuit. *Id.* at 259 n.a1.

54. Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 436 (1987).

Although it is sometimes said that *Miranda* displaced the old due process/“voluntariness” test (especially when one discusses *Miranda* hurriedly), this is not so. In a number of situations, the “voluntariness” test is still controlling.

For example, if a custodial suspect makes a valid waiver of his or her rights and agrees to answer police questions, the admissibility of any statement that follows must be determined on the basis of the voluntariness test.<sup>55</sup> When suspects who are *not* in police custody are questioned by the police, once again the admissibility of any resulting statements is still governed by the “voluntariness” test.<sup>56</sup>

As I have discussed at length elsewhere,<sup>57</sup> if the prosecution seeks to use a confession or incriminating statement to impeach a defendant’s testimony at trial, or to use the “fruits” of the confession (but not the confession itself),<sup>58</sup> here, too, the “voluntariness” test is controlling. Although statements obtained in violation of *Miranda* may still be used for impeachment purposes, “involuntary” or “coerced” statements may not.<sup>59</sup> Although the Court will usually permit the use of evidence derived from a *Miranda* violation (but not the statement itself), it will exclude the “fruits” of an “involuntary” confession.<sup>60</sup>

However, when the courts do grapple with a *Miranda* issue, I think it more helpful to talk about whether the statement was “compelled” within the meaning of the privilege against self-incrimination than to discuss whether the statement was “coerced” or the product of a “broken” or “overborne” will.

#### IV. ARE THERE BETTER WAYS TO DEAL WITH THE CONFESSION PROBLEM THAN *MIRANDA* WARNINGS?

Schauer wonders why there should be *Miranda* warnings “rather than a signed waiver, a witnessed waiver, an attorney-advised waiver, a witnessed or recorded interrogation, or any of some number of other devices that would more straightforwardly specify and make more

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55. See, e.g., Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2004 (1998).

56. See, e.g., Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 877 (1981).

57. See Kamisar, *supra* note 1, at 980–83.

58. See *id.* at 1000–02.

59. See *id.* at 983.

60. See generally *Missouri v. Seibert*, 542 U.S. 600 (2004); *United States v. Patane*, 542 U.S. 630 (2004).



Professor Schulhofer's concern that, although recording the interrogation would be an extremely valuable tool, "without clear substantive requirements against which to test the police behavior that the videotape will reveal, the objective record will lack any specific legal implications."<sup>66</sup>

## V. SOME FINAL THOUGHTS

I am indebted to Professor Schauer for causing me to reread a goodly number of confession cases and to view them somewhat differently than I had before. When I reread the opinions in an old confession case, frequently because a recent Supreme Court decision has wrestled with a somewhat new fact situation, or because a commentator such as Schauer has raised new questions, I rarely see the old case in quite the same way I did before.

I like to think that I have read more Supreme Court cases dealing with confessions more times than anyone else. If so, it is because I have probably written about confessions for a longer time than anybody else. I wrote my first article on police interrogation and confessions exactly fifty years ago,<sup>67</sup> shortly before *Escobedo* and *Miranda* were decided. In the decades that followed, I have tried to defend *Miranda*. But it would not be surprising if the rules governing police interrogation and confessions were to be changed in the foreseeable future. There has been too much criticism of *Miranda* and the rules it provides—both from the right and the left. But if and when the rules do change, *no matter how they change*, I venture to say that many people will be unhappy with the result. One reason is that many people approach what might be called the "police interrogation-confession" problem with different starting premises.

*Miranda* has much to say about the privilege against self-incrimination and the right to counsel. But that is not all it has to say. As Judge Henry Friendly once observed, the equal protection argument is "a ground bass that resounds throughout the *Miranda* opinion."<sup>68</sup> Continued Judge Friendly:

The involuntary confession rule afforded no benefit to the poor

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66. Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 556 (1996).

67. Yale Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 1027 (1963).

68. Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 711 (1968).

and ignorant, who confessed without having been subjected to unfair tactics, whereas the rich and the knowledgeable remained silent. Equality could be established only by advancing the point at which the privilege became applicable and surrounding the poor man with safeguards in the way of warning and counsel that would put him more nearly on a par with the rich man and the professional criminal.<sup>69</sup>

It seemed obvious to the *Miranda* Court that the rights it was establishing had to apply to “the indigent as well as the affluent.”<sup>70</sup> After all, “[t]he warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present.”<sup>71</sup>

However, others, such as Professor Gerald Caplan, who started out with different “first premises,” saw the issue differently:

[G]uilt is personal. That another, equally guilty, person got away with murder because of some fortuitous factor—he was more experienced in dealing with the police, he had a poorly developed sense of guilt, he had a smart lawyer, he knew his rights—or even because of discrimination, does not make the more vulnerable murderer less guilty. To hold otherwise is to confuse justice with equality.<sup>72</sup>

I doubt that anybody has ever criticized the “equal protection” argument in the *Miranda* setting more forcefully than Nicholas deB. Katzenbach did when he was U.S. Attorney General. Responding to Judge David Bazelon’s criticism of the first preliminary draft of the proposed American Law Institute’s *Model Code of Pre-Arrest Procedure* for failing to provide counsel for indigent custodial suspects<sup>73</sup> (in an exchange of letters that took place a year before *Miranda* was decided), Attorney General Katzenbach observed: “I have never understood why the gangster should be made the model and all others

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69. *Id.*

70. *Miranda v. Arizona*, 384 U.S. 436, 472 (1966).

71. *Id.* at 473.

72. Caplan, *supra* note 18, at 1457. *See also* Friendly, *supra* note 68, at 711 (maintaining that one can make a strong argument that the *Miranda* Court’s resolution of the equal protection argument “is too great a concession to egalitarianism. Equality, it can be forcefully contended, does not demand cessation of proper police practices that are valuable, perhaps essential, to the investigation and punishment of crime, simply because some segments of the population do not know they are not obliged to cooperate whereas others do.”).

73. At the time of his correspondence with Attorney General Katzenbach, Bazelon was Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit.

raised, in the name of equality, to his level of success in suppressing evidence. This is simply the proposition that if some can beat the rap, all must beat the rap.”<sup>74</sup>

Although the Bazelon-Katzenbach correspondence started out as a private exchange of letters between the two men, the correspondence was soon “leaked” to the press and widely read by the public. I came away with the distinct impression that most people agreed with the Attorney General. For me, that was the sobering end of the story.<sup>75</sup>

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74. Attorney General Katzenbach’s comments are quoted in Yale Kamisar, *Has the Court Left the Attorney General Behind?—The Bazelon-Katzenbach Letters on Poverty, Equality and the Administration of Criminal Justice*, 54 KY. L.J. 464, 474, 494 (1966). Katzenbach’s comments are criticized in Kamisar, *supra*, at 475–78, especially his use of the emotive words “beat the rap” and “gangster.”

75. Of course, although Attorney General Katzenbach most probably won in the court of public opinion, he lost in the Supreme Court. *See generally Miranda*, 384 U.S. at 436.